No. 02-1212

Supreme Court, U.S.
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In the

Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA,

Petitioner,

v.

EDWIN F. DAVID, On Behalf of Himself and a Class of All Persons Similarly Situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

William A. Kent
Counsel of Record
15242 Normandie Avenue
Irvine, CA 92604
(949) 651-1102
Attorney for Respondent Edwin F. David

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCNET.COM

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals in the 1977 Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977) properly interpret the "due process" clause by holding that a City which tows a motor vehicle for traffic reasons must provide by law a post-tow impound hearing to be held within five (5) days or less?

PARTIES TO THE PROCEEDINGS ARE;

EDWIN F. DAVID, an individual, on behalf of himself and a class of all persons similarly situated;

CITY OF LOS ANGELES, a municipal corporation

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QUESTION PERTAINING TO THE SUPREME COURT'S JURISDICTION.

The Ninth Circuit Court of Appeals in its judgment reversed the dismissal of the case by the District Court and remanded the case back to the District Court for further proceedings.

Whether this case is ripe for review by this Court under Section 1291, 28 USCA § 1291, is not clear and the question is, therefore, raised at the outset at this time to invite the Court's attention to this preliminary question.

COUNTER-STATEMENT OF THE CASE

Respondent DAVID is a senior citizen with a handicap placard. The motor vehicle he had parked was legal at the time, while he visited his cardiologist for an emergency medical visit. He parked at 2:30 p.m. on August 13, 1998, and while the City usually made parking illegal after 4 p.m. for the rush hours, this time the sign read 3 p.m. While DAVID was in his doctor's office for an emergency visit, he was unable to leave in time, and, consequently, his motor vehicle was towed at about 3:15 p.m., with no inquiries made by the traffic official to the guard standing watch at the nearby entrance to the medical building.

When DAVID received a telephone call from someone a few days before the scheduled hearing, he was not sure who the person was. Having received no letter about a continuance, he stated to the unknown caller that he wanted to go ahead with the hearing when told that the officer may not appear. He had made the request for a hearing when the car was originally towed on August 13, 1998, but the City of Los Angeles did not

schedule the hearing until September 9, 1998, at the City's Department of Transportation ("DOT") offices. While the hearing had been scheduled by a formal letter, he received no formal letter advising him of a continuance from the DOT.

When he arrived at the hearing promptly, he was informed by the DOT that the towing officer would not be present and that unless he agreed to go ahead without the officer being present, the case would automatically be continued to another date. Twenty-Six days had already passed when this first hearing was scheduled. DAVID had arranged to take time off for this hearing. Although he wanted to question the officer, about the trees, trucks, and sign obstructions, he reluctantly agreed to go ahead when faced with this Hobson's choice. A continuance would mean a further delay of his right to a speedy hearing, which the City was trying to use to force him to give up his constitutional rights. He refused.

He believed that without the officer present the City could not prove its case. At the hearing, the City anyway accepted the hearsay narrative report of the tow officer as prima facie evidence of a violation of the law and placed the burden of proof upon DAVID to rebut that tentative finding that there was probable cause. Thus, Respondent was deprived of his right in any event of his right of confrontation and cross-examination. The City "chilled" his free exercise of his right to a speedy hearing and to his right of confrontation and cross-examination. The District Court dismissed the case on a summary judgment motion by the City. On Appeal, the Ninth Circuit panel held that on the basis of the *en banc* decision by the full court in 1977 in ***Stypmann v. City and County of San Francisco***, 557 F. 2d 1338, (9th Cir. 1977), (Browning, P.J.), the City's scheduling and

holding of a hearing 26 days after the tow, to wit, September 9, 1998, was too late and Respondent was denied and deprived of his constitutional right to a prompt hearing. The ***Stypmann*** case held that a post-tow hearing must take place in less than 5 days from the tow. The ***Stypmann*** case held that a San Francisco Ordinance enacted during the pendency of the appeal to require a hearing within 5 days was too long. The ***Stypmann*** case struck down the California Vehicle Code § 22851, which imposed a lien in favor of the City, as being unconstitutional because no prompt hearing was therein provided.

Another 3-judge Ninth Circuit panel in 1982 had revisited the question and held that 48 hours should be the desired period of time for a post-tow hearing. Goichman v. Rheuban Motors, Inc. 682 F.2d 1320 (9th Cir. 1982).

Several cases in the Ninth Circuit held that moneys paid for towing and storage, where the hearing was provided some 25 days or more after the tow, and where the vehicle was not redeemed, had to be returned and the vehicle released. Soffer v. City of Costa Mesa, 607 F. Supp. 975, 983 (CD Cal. 1985), affirmed in part, reversed in part, remanded 798 F.2d 361 (9th Cir. 1985); Huggins v. Port of Newport, 121 F. 3d 1281, 1284, fn. 5 (9th Cir. 1997).

The result reached by the ***Stypmann*** case, *supra*, is consistent with other Circuits. Incidentally, the vehicles in the ***Stypmann*** were returned to the 11 plaintiffs while the case was pending, so that the ***Stypmann*** court was not dealing with vehicles still impounded.

ARGUMENT:

THE *STYPMANN* EN BANC COURT AND THIS PANEL OF THE NINTH CIRCUIT DID NOT FAIL TO FOLLOW ANY DECISIONS OF THIS COURT BUT IN FACT FOLLOWED THEM AND WAS CONSISTENT WITH OTHER CIRCUIT COURT DECISIONS.

Petitioner claims that the Panel in this case failed to follow the teachings of the Mathews v. Eldridge case, 424 US 319. That is not true. This Panel followed the binding ruling of **STYPMANN** which in turn fully and fairly analyzed the Mathews criteria. Once a case is decided by a Court en banc, it is the law that it must be followed by other panels until overruled by a Court en banc. Petitioner is therefore in error in saying that the Ninth Circuit did not follow the Mathews teachings.

Morrissey v. Brewer, 408 US 471, cited by Petitioner as not being followed, was a parole revocation case and has nothing to do with the issues in this case.

This case was a seizure of private property by law enforcement without the consent of the owner of the property. This kind of case traditionally implicates the full panoply of the "due process" clause. Differential legal diagnosis in "due process" must be made upon the particular facts of the case, Was a right involved? A privilege? Was it an adversary type of proceeding? Etc.

The case of Breath v. Cronvich, 729 F.2d 1006 (5th Cir. 1984) is miscited and misplaced.. The court there was dealing with general procedures adopted by the defendants. It observed that "a hearing must be provided within a reasonable period of time." Id. 1011. The Court did not deal with the appropriate "reasonable period of time" question. The main issue in that case was whether the **procedure** by which a towee could sign his own

recognizance and then have the vehicle released to him without paying the towing and storing charges **should have been communicated to the plaintiff** in that case beforehand, before the plaintiff wound up paying the towing and storage charges, not knowing this. The Court held that everyone is presumed to know the law and found against the plaintiff on that point. Again, that case has nothing to do with this case.

The City speculates that the Breath court would have authorized a long or longer period of time once the towee signs his own recognizance and retrieves his vehicle. A case is not precedent or authority for what it does not hold or decide. Petitioner is purely speculating as to what the Breath court would do in this case. The City claims it could not find any other cases. There are other cases and all support the ***Stypmann*** rationale. In Goichman v. City of Aspen, 859 F. 2d 1466 (10th Cir. 1988), the Court found that the towee there had a right to go to a municipal court hearing on demand, Id 1468, fn.5, and take the matter up with a traffic judge. The Court stated: "We leave to another day the question of how promptly the hearing in the underlying violation must be held....." *Ibid.* It noted, however, that the ordinance of the City had been amended during the pendency of the appeal to require a hearing within 48 hours and tacitly nodded approval of this period of time.

In Coleman v. Watt, 40 F. 3d 255 (8th Cir. 1994), the Court held that a one week delay in scheduling a hearing was a denial of due process.

In DeFranks v. Mayor & City Council of Ocean City, Md., 777 F.2d 185 (4th Cir. 1985), there was a hearing within 24 hours of the request which was acceptable.

In Weinmuch v. Park City, 751 F.2d 357 (10th Cir. 1984), a hearing on the validity of the tow could be held any Tues or Thurs between 10:00 a.m. to 4p.m. That was acceptable.

In Cokinos v. D.C., 728 F.2d 502 (DC 1983) the hearing was available within 16 hours. That was acceptable.

The weakness with the City's position is that in reality no one knows when someone will redeem or recover his motor vehicle from the City impound station. In some cases, it could be one day, in others, two, three days, one week, two weeks, one month, or never. The motor vehicle which was towed could be owned, leased or borrowed and that could add to the redemption problem.

The teachings of this Court are that where a hearing is required by the Constitution, a state or its subdivisions, must by written law provide for a proper due process hearing within a prompt period of time as contemplated by law, so as not to be leave that question for state or local officials to guess at or decide ad hoc, or left to chance, or by one's grace, or favor. See Coe v. Armour Fertilizer Works, 237 US 413, 424 (1915); Security Trust & Safety Vault Co. v. Lexington, 203 US 323, 333; Wuchter v. Pizzuti, 276 US 13, 24-25 (1928); Central of Georgian Ry Co. v. Wright, 207 :US 127, 138 (1907); Montana-Dakota Power Co. v. Weeks, 8 F. Supp. 935, 938 (D ND 1934); Investors' Syndicate v. Portert, 52 F. 2d 192, 198 (D Mont. 1931); Tumulty v Dist of Col., 102 F.12s 254, 262 (DC 1929), to cite a few.

If the City does not have a law with these specifications, then what is an employee to say when, where and how when this question comes up? The fact is that one may get it right the first time, what about the

next time? The law has to be certain, "The knowne certainty of the law is the safetie of all" sayeth Lord Cooke. How can it be certain if there is no law?

What period of time is the City proposing if the car is retrieved two days after it is towed? Three days after it is towed? Seven days after it is towed? Etc. There must be one law which prescribes a hearing after a vehicle is towed, regardless of when it may be redeemed. One cannot know that when the car is towed! In this case, not only did the towing of the vehicle trigger the due process clause, but, also, the imposition of the "lien" by the California Lien Law § 22851, trigger it as well, the same law that was held unconstitutional in the ***Stypmann*** case, still on the books with no due process law still in place!

The City makes the assumption that one who retrieves his vehicle is not entitled to a prompt hearing. The City cites no authority for that. What triggers the promptness of the hearing is (1) the actual seizure and/or (2) the imposition of the lien. Of course, it can be one hearing for both, but the constitution requires at the very least, that the City has in place by law a prompt due process hearing. All of the cases cited herein seem to concur on that point. The ***Stypmann*** case decided by the full Circuit Court thoroughly analyzed the proper standards and the law was laid down to prescribe a period of time less than 5 days and this present panel has simply followed that law.

California law in this case, Cal. Vehicle Code, Section 22852, requires that within 5 days that notice be mailed, then the owner or his agent must request a hearing within 10 days, then a notice that a hearing is scheduled is sent out within five days of that and when all these time periods are added up, plus the mailing time, one is

looking at 25 to 35 days for the hearings. Moreover, an additional period of time is added by the City requesting a postponement because the tow officer did not show up. The City has a policy of automatically postponing the hearing if the officer fails to appear, but the case is dismissed if the towee fails to show up.

This strikes at the heart of being a case of unequal protection of the law. The law provides that the withholding of one's vehicle until the towing and storage charges are paid is a type of seizure which requires a prompt hearing. For example, in the Fuentes v. Shevin case, 407 US 67, 85 (1972), the Court said: "When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge and the time needed to take advantage of the recovery provision." It only confuses the issue to talk about bonds or retrieving goods or what-have-you. The law has to be certain and a definite period of time must be prescribed in order to satisfy the period of time within which the State or its subdivisions must hold the due process hearing.

There is no real conflict among any of the Circuits. They all seem to feel the same way about having a prompt hearing, days not weeks.

Each *genre* of cases brings with it its own special applications. Certainly, what is proper or appropriate in one case, say a custom case, may not be proper in a different case, such as a parole-revocation case. This type of case, to wit, seizure of a motor vehicle, stands by itself and the cases dealing with that issue are not in conflict.

The City of Los Angeles has to fall in line with all the decisions of the circuits which, when properly analyzed, say that the City should provide for a prompt due process type of hearing within a short period of time, "reasonably promptly." In the Ninth Circuit, that turns out to be "in less than 5 days." The City has available a host of good people who can work this out so that the law reads the way it should. So far, the City has not had any inclination to do the right thing since the ***Stypmann*** case was decided way back in 1977!

Incidentally, when these hearings are conducted, there is only one person always present for the DOT, the hearing examiner, and he puts in a cassette and tapes the hearing. That hardly sounds like an insuperable job of working this hearing process out without too much difficulty upon short notice in keeping with the constitutional dictates. It is submitted that granting certiorari to this question will not yield any significant results nor create any new enlightenment or harmony which is not already out there.

CONCLUSION

Wherefore, Respondent requests that the petition for a writ certiorari be denied.

Respectfully submitted,

William A. Kent
Counsel of Record
15242 Normandie Avenue
Irvine, CA 92604
(949) 651-1102
Attorney for Respondent
Edwin F. David